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No. 88-1805

In The

Supreme Court of the United States

October Term, 1988

EASTERN NEBRASKA COMMUNITY OFFICE OF RETARDATION et al.,

Petitioners,

vs.

PATRICIA ANN GLOVER et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Patricia Ann Glover et al. respectfully request this Court to deny the Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit made the subject of Petitioners' Writ of Certiorari is reported at 867 F.2d 461 (8th Cir. 1989). The opinion of the District Court for the District of Nebraska is reported at 686 F. Supp. 243 (D. Neb. 1988).

STATEMENT OF THE CASE

This action arises out of the adoption by Petitioner Eastern Nebraska Human Services Agency ("ENHSA") of a "Chronic Infectious Disease Policy" (the "Policy") in November 1987. The Policy required certain employees of Petitioner Eastern Nebraska Community Office of Retardation ("ENCOR") employed in identified job positions ("Respondents") to submit to mandatory blood testing for Human Immunodeficiency Virus ("HIV") and Hepatitis B ("HBV").

Respondents Patricia Ann Glover et al. brought an action in the United States District Court for the District of Nebraska for a permanent injunction against implementation of the Policy. Respondents' principal contention was that the Policy constitutes an unreasonable search under the Fourth and Fourteenth Amendments to the United States Constitution.

Following a trial, the Honorable Lyle E. Strom, Chief Judge, presiding, concluded that the Policy violated Respondents' Fourth Amendment rights against unreasonable searches and seizures and granted the request for a permanent injunction. (*Glover v. ENCOR*, 686 F. Supp.

243 (D. Neb. 1988); Appendix to Petition ("App.") 3) The Court of Appeals for the Eighth Circuit affirmed the District Court's opinion. (*Glover v. ENCOR*, 867 F.2d 461 (8th Cir. 1989); App. 23)

In addition to the foregoing, as part of their statement of the case, Respondents incorporate by reference the statement of facts from the Court of Appeals' opinion. (*Glover*, 867 F.2d at 462-63; App. pp. 24-26)

REASONS FOR DENYING THE WRIT

Introduction

Respondents submit that the issues raised by the "Questions Presented For Review" ("Questions Presented") in the Petition for Writ of Certiorari ("Pet.") are not a part of and do not form the basis for the opinion below. The Petition raises no error of law; only questions of fact are involved in this case. Therefore, this cause does not present any issue for review by this Court.

Contrary to the contentions of the Petitioners, the Court of Appeals did not apply a probable cause or warrant requirement in holding that the Policy was unreasonable (Question Presented No. 1), nor did the Court of Appeals find that the Policy invaded a separate privacy interest regarding medical information (Question Presented No. 2). Rather, in holding that ENCOR's mandatory blood testing Policy was an unreasonable search and seizure, the Court of Appeals applied the settled Fourth Amendment principle found in *O'Connor v. Ortega*, 480 U.S. 709 (1987), that intrusions by public

employers on constitutionally protected privacy interests of government employees must be judged by the standard of "reasonableness under all of the circumstances." *Id.* at 725-26.

The Court of Appeals examined the district court's specific findings of fact and, holding them not to be clearly erroneous, properly assessed the reasonableness of the search by balancing the Respondents' privacy interests implicated by the Policy against ENCOR's competing interests. (*Glover*, 867 F.2d at 463-64; App. 25-28) In applying this correct balancing test to the facts, the Court of Appeals relied on principles of law consistent with prior and recent decisions of this Court.

Respondents submit that the Court of Appeals fully considered, correctly decided and accurately applied the proper Fourth Amendment standard of "reasonableness under all of the circumstances" to the factual findings made by the district court. Upon application of that standard to the district court's critical finding that the risk of disease transmission in the ENCOR environment is negligible, the Court of Appeals held that ENCOR's blood testing policy was not reasonable at its inception. (*Glover*, 867 F.2d at 464; App. 28) As a consequence, only questions of fact are involved in this case. ("By our decision we intend no broad-based rule with regard to testing public employees for any infectious disease, including AIDS. We hold only that under the facts established in this case, the district court properly enjoined ENHSA's policy as an unreasonable search and seizure under the fourth amendment." *Glover*, 867 F.2d at 464; App. 28-29)

Finally, the decision of the Court of Appeals is not in conflict with the decisions of this Court. The Questions Presented are plainly without merit and Petitioners' arguments for review provide insubstantial grounds for this Court to grant a Writ of Certiorari.

ARGUMENT

I. THE COURT OF APPEALS DID NOT APPLY A WARRANT OR A PROBABLE CAUSE STANDARD IN HOLDING THAT THE SEARCH OCCASIONED BY THE POLICY WAS UNREASONABLE. PROPERLY UNDERSTOOD, THE DISPUTE IN THIS CASE INVOLVES FINDINGS OF FACT BY THE DISTRICT COURT WHICH DO NOT JUSTIFY REVIEW BY THIS COURT.

Petitioners assert that the Court of Appeals erred in applying a warrant or probable cause requirement to examine the reasonableness of the search occasioned by the Policy. (Pet. 14-15) Petitioners contend that, instead, the Court of Appeals should have applied the "special needs" exception to determine the appropriate standard of reasonableness applicable to the search. (Pet. at 10-11, 15)

Petitioners' argument is baffling, since the Court of Appeals did not apply a warrant or probable cause requirement (or even an individualized suspicion requirement) to evaluate the reasonableness of the search in question. Rather, the Court of Appeals examined the reasonableness of the search by applying the "special needs" doctrine announced by this Court in, among other cases, *O'Connor v. Ortega*, 480 U.S. 709 (1987). The application of the "special needs" doctrine by the Court of Appeals is

not surprising since Respondents do not contend, and have never contended, that a warrant or probable cause is required by the balance of private and governmental interests in this case.

Respondents and Petitioners have always been in basic agreement that the proper standard to assess the reasonableness of Petitioners' search is supplied by this Court's opinion in *O'Connor, supra*:

> In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace.
>
> * * *
>
> There are some circumstances, however, in which we have recognized that a warrant is unsuitable.
>
> * * *
>
> In sum, we conclude that the "special needs, beyond the normal need for law enforcement make the . . . probable-cause requirement impracticable . . . ."
>
> * * *
>
> We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees . . . should be judged by the standard of reasonableness under all of the circumstances. Under this reasonableness standard, both the inception and scope of the intrusion must be reasonable. . . .

O'Connor, supra, 480 U.S. at 719-20, 725-26.

This is the exact standard which the Court of Appeals applied in holding for Respondents below:

> We believe, however, the district court correctly recognized that in this case, the Supreme Court standard requires us to balance the employee's reasonable expectations of privacy against ENHSA's interest in providing a safe training and living environment for its clients.
>
> * * *
>
> The district court found the risk that ENCOR clients will contract the AIDS virus from the employees is "miniscule, trivial, extremely low, extraordinarily low, theoretical and approaches zero" *Glover*, 686 F. Supp. at 251. The court made similar findings with regard to the hepatitis B virus. *Id.* We have carefully reviewed the record, and these findings are not clearly erroneous. *See* Fed. R. Civ. P. 52(a).
>
> These critical findings also lead unmistakably to the conclusion that ENHSA's blood testing policy is not reasonable at its inception under applicable fourth amendment standards.

Glover v. ENCOR, 867 F.2d at 463-64; App. 27-28.

Petitioners mistakenly characterize the Court of Appeals' review of the finding of fact regarding the risk of disease transmission at ENCOR as surreptitiously applying a probable cause standard to its examination of the reasonableness of the search. (Pet. 14-15) No such standard was applied. Petitioners' erroneous characterization of the Court of Appeals' opinion is an attempt to create the appearance of error where none exists.

Given the consensus as to the appropriate legal standard to assess the reasonableness of the search, Petitioners' real disagreement in this case is with the critical findings of fact by the district court, to-wit: the risk ENCOR clients will contract HIV or HBV from the employees approaches zero and mandatory blood testing

is not necessary to protect ENCOR clients from any medical risk. ("The medical evidence, however, demonstrates that even if staff members were infected with a chronic infectious disease, the risk to ENHSA's clients is extremely low and approaches zero. The medical evidence is overwhelming that the risk of transmission of the AIDS virus in the ENCOR workplace is trivial to the point of non-existence." *Glover*, 686 F. Supp. at 250; App. 19-20) The Court of Appeals carefully reviewed the district court's findings of fact and held that its findings were not clearly erroneous. (*Glover*, 867 F.2d at 464; App. 28) Under those facts, the Court of Appeals correctly concluded that the testing Policy was unjustified and constituted an ur.. nable search and seizure under the Fourth Amendment. (*Glover*, 867 F.2d at 464; App. 28-29) Accordingly, this case involves only questions of fact which, although now disputed by Petitioners, nonetheless, are not properly reviewable by this Court.

II. THE COURT OF APPEALS DID NOT BASE ITS DECISION ON A FINDING THAT THE POLICY VIOLATED RESPONDENTS' CONSTITUTIONAL RIGHT OF PRIVACY.

In a vein similar to their "probable cause" argument, Petitioners also attempt to recharacterize the Court of Appeals' opinion as based on a violation of Respondents' constitutional right of privacy. This was not the basis for the Court of Appeals' decision.

Petitioners seize on the use of the phrase "reasonable expectations of privacy" (Pet. 19) by the Court of Appeals to allege that a conflict exists between this decision and decisions of other federal courts of appeals regarding a

privacy right in medical information. However, the Court of Appeals' references to "reasonable expectations of privacy" were made in the context of applying the Fourth Amendment balancing test required by *O'Connor, supra.* (*Glover,* 867 F.2d at 463; App. 27) The Court of Appeals did not decide that Respondents had a separate constitutional right to privacy in medical information.

In sum, just as Petitioners attempt to create error where none exists by arguing the decision below was based on a warrant or probable cause standard, they also attempt to create a conflict where none exists by arguing that the Court of Appeals' decision was based on a right of privacy in medical information. Neither probable cause nor a constitutional privacy right in medical information was the basis for the Court of Appeals' opinion.

III. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

This Court's decisions permitting drug testing in limited circumstances in *Skinner v. Railway Labor Executives Association,* ___ U.S. ___, 109 S.Ct. 1402 (1989), and *National Treasury Employees Union v. Von Raab,* ___ U.S. ___, 109 S.Ct. 1384 (1989), do not conflict with the Court of Appeals' decision in this case. The necessary connection between the governmental interests and the asserted need to test recognized by the Court in those cases is absent here. Specifically, in this case the district court found as a matter of fact, and the Court of Appeals affirmed, that Petitioners had failed to establish any link

between providing a safe living and working environment at ENCOR and the prohibited testing. ("Because the risk of disease transmission has been shown to be negligible in the ENCOR environment, ENHSA's articulated interest in requiring testing does not constitutionally justify requiring employees to submit to a test for the purpose of protecting the clients from an infected employee." *Glover*, 867 F.2d at 464; App. 28)

CONCLUSION

The Court of Appeals applied the correct standard of reasonableness to the facts found by the district court. The issues presented by the Petitioner are illusory and Petitioners' dispute in this case truly involves the factual findings by the district court, not legal issues.

Petitioners have wholly failed to establish any basis for this Court to exercise *certiorari* jurisdiction and the Petition should be denied.

Respectfully submitted,
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